DATO' LEONG POW KUE & ORS

v.

GAN KIM SING; PENTADBIR TANAH DAERAH JOHOR BAHRU & ORS (THIRD PARTIES)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 23-245-1989]
20 NOVEMBER 1998

CIVIL PROCEDURE: *Striking out - Want of prosecution - Delay in prosecuting action - Delay in filing summons for directions by more than seven months - Defendant an advocate and solicitor of high standing - Whether defendant suffered serious prejudice - Whether action ought to be struck off*

CIVIL PROCEDURE: *Striking out - Want of prosecution - Delay in prosecuting action - Interpretation of "inordinate delay" and "inexcusable period" - What must be shown to succeed in striking out an action - Nature and rationale of an order striking out an action*

CIVIL PROCEDURE: *Striking out - Grounds for - When can court strike out an action - Rules of the High Court 1980, O. 19 r. 1, O. 24 r. 16(1), O. 25 r. 1(4), O. 26 r. 7(1), O. 28 r. 10(1), O. 34 r. 8 & O. 70 r. 18*

CIVIL PROCEDURE: *Action - Reinstatement of - Action struck out due to counsel's failure to attend hearing - Counsel failed to attend due to misimpression on his part - Whether reasonable ground to reinstate*

LEGAL PROFESSION: *Retainer - Duties to client - Negligence - What amounts to negligence*

The plaintiffs brought an action against the defendant, an advocate and solicitor, for negligence and claimed damages. The defendant successfully applied to the Senior Assistant Registrar to strike out with costs the plaintiffs' action for want of prosecution. The plaintiffs filed an appeal against this decision but on the day fixed for hearing, counsel for the defendant failed to appear and thus the appeal was also struck out with costs. This was the plaintiffs' application to reinstate the said appeal. Plaintiffs' counsel averred that his failure to attend the appeal was due to a misimpression in his mind that the matter fixed for hearing on the date in question was not the appeal against the decision to strike out but some other matter.

It was in evidence that the plaintiffs had delayed filing their summons for directions by more than seven months and based on this the defendant contended that this was a fit case for striking out for want of prosecution.

Held:

[1] An advocate and solicitor who handles a case where his colleague at the bar is sued for negligence should be diligent, careful and alert in the conduct of his affairs in court.

[2] The plaintiffs' counsel's failure to attend court on the date fixed and the subsequent action by the plaintiffs to reinstate their appeal had caused the disposal of the action to be further delayed. The plaintiffs' indolent conduct can be said to be contumelious.

[3] The failure to attend was entirely due to the mistake on the part of the plaintiffs' solicitor and this does not constitute sufficient ground for reinstating the plaintiffs' appeal. The plaintiffs and their counsel failed to disclose any reasonable ground to reinstate the appeal.

[4] The Rules of the High Court 1980 confers explicit power on the courts to strike out an action when there is non-compliance, or delay in compliance, with the prescribed schedule of timetable. The power to do so exists (a) when there has been a delay in filing the statement of claim; (b) when there has been a delay in setting down the case for trial; (c) when there has been a failure to issue a summons for directions; (d) when there is a failure to comply with the requirements for discovery; (e) when there is a failure to answer interrogatories; (f) when there is a failure to prosecute the originating summons proceedings with despatch; and (g) when there is a failure to file and exchange affidavits.

[4a] The court also has an inherent power to dismiss an action for want of prosecution.

[5] An order dismissing an action for want of prosecution is a draconian measure and will not be made lightly. The rationale that the default should be intentional and contumelious lies solely to protect the institution of the court.

[6] It is purely a matter of fact and degree whether there has been an inordinate and inexcusable delay. The term "inordinate delay" has been interpreted to mean materially longer than the time usually regarded by the profession and courts as an acceptable period. The term "inexcusable period", on the other hand, means no more than there

being no satisfactory explanation as to why the case did not proceed with due speed and diligence.

[7] For a defendant to succeed in his action to strike out the plaintiff's claim for want of prosecution, it is not sufficient for the defendant to establish inordinate and inexcusable delay. There is another burden imposed on the defendant and that would be for the defendant to produce evidence that a fair trial is impossible or that he has suffered or is likely to suffer some serious prejudice as a result of the delay. What is serious prejudice is entirely a matter of fact and degree.

[8] The defendant here, being an experienced advocate and solicitor of excellent standing, must have been prejudiced by the delay as it affected his professional reputation.

Per curiam:

[1] A retainer imposes an obligation on the part of an advocate and solicitor to be both skillful and careful. A solicitor holds himself out as having adequate skill and knowledge to conduct whatever business he undertakes be it contentious or non-contentious. A solicitor owes a duty to his client both in contract and in tort.

[1a] If a solicitor is in breach of his contractual duty to his client or if that solicitor fails to use proper care and his client suffers a loss, the solicitor will be liable for damages even if the claim in negligence is purely for financial loss.

[1b] Where a solicitor conducts an action negligently or fails to bring an action, the measure of damages would be the amount the plaintiff might have recovered in the action in the event the solicitor had exercised due negligence.

[1c] A solicitor is not guilty of negligence if he merely acted on his client's instructions in the reasonable belief as to its correctness.

[Application dismissed.]

Cases referred to:

Abdul Majeed v. Yeo Chng Tay [1964] 30 MLJ 75 ***(foll)***
Andrews v. Hawley [1857] 26 LJ Ex 323 ***(refd)***
Bagot v. Stevens, Scanlon & Co Ltd [1966] 1 QB 197 ***(refd)***
Birkett v. James [1978] AC 297 ***(aff)***
Biss v. Lambeth, Southmark and Lewisham Area Health Authority [1978] 1 WLR 38 ***(refd)***

Buckley v. National Union of General and Municipal Workers [1967] 3 All ER 767 ***(refd)***
Burmah Oil Co Ltd v. Bank of England [1979] 2 All ER 461 ***(aff)***
Chapman v. Chapman [1870] LR 9 Eq 276 ***(refd)***
Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58 ***(foll)***
Clarke v. Kirby-Smith [1964] Ch 506 ***(refd)***
Cook v. S [1966] 1 All ER 248 ***(refd)***
Cook v. S [1967] 1 All ER 299 ***(refd)***
Confidence Concrete Sdn Bhd v. Shimizu Premba Sdn Bhd [1994] 4 CLJ 300 ***(refd)***
Datuk Samy Velu v. Karpal Singh [1989] 3 MLJ 493 ***(refd)***
Faithful v. Kesteven [1910] 103 LT 56 ***(refd)***
Francis v. Francis and Dickerson [1955] 3 All ER 836 ***(refd)***
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 ***(aff)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 2 MLJ 129 ***(foll)***
Godefroy v. Dalton [1830] 6 Bing 460 ***(refd)***
Griffiths v. Evans [1953] 2 All ER 1364 ***(refd)***
Haji Mohamed bin Suboh v. Devadas [1981] 1 MLJ 136 ***(foll)***
Harrington v. Binns [1863] 3 F & F 942 ***(refd)***
Hart v. Frame [1839] 6 CI & Fin 193 ***(refd)***
Heywood v. Wellers (a firm) [1976] QB 446 ***(refd)***
Hill v. Finney [1865] 4 F & F 616 ***(refd)***
KS Chua & Co v. Chui Miang Chew & 5 Ors [1996] 2 CLJ 676 ***(aff)***
Lee Kuan Yew v. Tang Liang Hong (No 3) [1997] 2 SLR 841 ***(refd)***
Lee Mun Tuck v. Tan Chin Kah & Anor [1991] 1 CLJ 631 ***(refd)***
Lee v. Dixon [1863] 3 F & F 744 ***(refd)***
Leong Seng Kiat v. Law Peng Guan & Ors [1992] 2 CLJ 825 ***(refd)***
Lewis v. Collard [1853] 14 CB 208 ***(refd)***
Malaysian International Merchant Bankers Ltd v. Highland Chocolate & Confectionery Sdn Bhd & Anor [1997] 1 CLJ 480 ***(cit)***
Midland Bank Trust Co Ltd v. Hett, Stubb and Kemp (a firm) [1979] Ch 384 ***(refd)***
Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia & Ors [1996] 2 CLJ 923 ***(aff)***
Pearson v. Pearson (Queen's Proctor showing cause) [1969] 3 All ER 323 ***(refd)***
Pilkington v. Wood [1953] 2 All ER 810 ***(refd)***
Potts v. Sparrow [1834] 6 C & P 749 ***(refd)***
Property of George Chen Chih Hsiung v. Peter Chi Man Kwong & Ors [1996] 1 SLR 353 ***(refd)***
Public Finance Bhd v. Natcom Development Sdn Bhd & Ors [1996] 4 CLJ 291 ***(refd)***
Purves v. Landell [1845] 12 CL & Fin 91 ***(refd)***
Ratnam v. Cumarasamy And Another [1964] 3 All ER 933 ***(aff)***
Re Jokai Tea Holdings Ltd [1993] 1 All ER 630 ***(refd)***
Re Pek Chuan Development Pte Ltd [1988] 3 MLJ 140 ***(refd)***
Revici v. Prentice Hall Incorporated And Others [1969] 1 All ER 772 ***(aff)***
R. Rajasingam v. Balwant Singh Purba [1996] 3 CLJ 222 ***(refd)***
Shilcock v. Passman [1836] 7 C & P 289 ***(refd)***

Sii Hing & Anor v. David TM Ting [1993] 1 CLJ 537 ***(refd)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 ***(foll)***
Spector v. Ageda [1971] 3 All ER 417 ***(refd)***
Te Cheng Hoi v. Peh Im Kweng [1994] 3 CLJ 501 ***(refd)***
The Plato' [1995] 3 SLR 829 ***(refd)***
TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin [1997] 4 CLJ 710 ***(foll)***
United Malayan Banking Corp Bhd v. Palm and Vegetable Oil (M) Sdn Bhd [1994] 3 CLJ 144 ***(aff)***
Vasudevan v. T Damodaran & Anor [1981] 1 CLJ 84 ***(refd)***
Wee Siew Noi v. Lee Mun Tuck [1993] 2 SLR 232 ***(refd)***
White v. Jones [1995] 1 All ER 691 ***(refd)***
Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 ***(aff)***
Yong Beng Credit Sdn Bhd v. Tia Chong King @ Tay Chong Keng t/a Polysan Co. [1993] 4 CLJ 502 ***(refd)***
Yukilon Manufacturing Sdn Bhd "[No: 2]" & Anor v. Dato Wong Gek Meng & 3 Ors [1997] 4 CLJ 209 ***(aff)***

Legislation referred to:
Land Acquisition Act 1960, ss. 8, 9, 16, 22, (3)(b), 23
Rules of the High Court 1980, O. 18 rr. 2(1), 20(1), O. 19 r. 1, O. 24 r. 16(1), O. 25 rr. 1(1), (4), O. 26 r. 7(1), O. 28 r. 10(1), O. 34 r. 8, O. 70 r. 18

Other sources referred to:
Abuse of Process of the Court: Handle With Care, JA Jolowicz, [1990] CLP 77
The English Reports, vol. CLXXVI Nisi Prius VII, p 341

For the plaintiffs - Anantha Kumar Ramasamy; M/s Nijar Kumar Netto & Partners
For the defendant - M Pathmanathan (Gan Techiong with him); M/s Gan & Lim

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

Introduction

Enclosure 148 was the plaintiffs' application to re-instate encl. 144. That encl. 144 was nothing more than an appeal to the judge-in-chambers which was struck off with costs by me on 15 August 1997. When encl. 148 was scheduled for hearing on 25 November 1997, I too had, using my judicial discretion, dismissed it with costs forthwith. At first blush this appears to be an ordinary case, a run of the mill case that appears in the High Court form time to time. A dull, boring and mundane case cannot be pegged to nor appropriately describes encl. 148 because it involves the reputation of a

senior member of the bar one Mr Gan Kim Sing, the sole defendant in the present case. Of course, the defendant is before this court to seek justice as: "Justice is truth in action" (Benjamin Disraeli, a speech delivered on 11 February 1851). To the defendant the: "Love of justice in most men is no more than the fear of suffering injustice" (*La Rochefoucauld*, Maxims). The defendant suffers in silence for a number of years and in seeking justice he believes that: "A blow with a word strikes deeper than a blow with a sword" (Robert Burton, *The Anatomy of Melancholy*).

The Chequered History Behind Encl. 148

By a writ of summons dated 11 October 1989 (encl. 2) supported by the statement of claim, the plaintiffs' brought an action against the defendant for negligence and claimed damages in the sum of RM197,070 together with interest thereon at the rate of 8% per annum from 12 October 1984 till date of realisation, costs and such further or other relief as this court deems just. At all material times the defendant, an advocate and solicitor of the High Court of Malaya carried on his law practice under the name and style of "Gan & Lim" in good old Johor Bahru. By way of a retainer on 12 April 1984, the plaintiffs agreed to retain and employ the defendant for reward and the defendant accepted that retainer in respect of the purchase by the plaintiffs of a piece of land described as CT 2881, Lot 5173, township of Johor Bahru, district of Johor Bahru and measuring 29,317 square feet from Seng Hup Chan Auto Supply Sdn Bhd (in liquidation), the 12th third party. I will elaborate further on the actual date of that retainer in the later part of this judgment. The consideration for the sale of that land was RM967,461 calculated at the rate of RM33 per square foot. It was averred that as an express or an implied term and condition of that retainer, the defendant warranted or alternatively it was the duty of the defendant to:

(a) exercise all reasonable care, skill, diligence and competence as a solicitor in respect of the sale and purchase of that land; and

(b) carry out all the enquiries and searches in respect of the land to protect the plaintiffs' interest.

It was said that the defendant prepared documentation for the plaintiffs to purchase the land and be registered as its owners but somehow it was said that by the negligence of the defendant and breach of duty the plaintiffs ended up purchasing the land minus 5,790 square feet. The defendant's negligence was particularised as:

(a) Failing to carry out adequate searches and enquiries, or at all, to ascertain that the plaintiffs could be registered as the proprietors of the

entire 29,317 square feet of land as provided for in the sale and purchase agreement dated 21 April 1984;

(b) Failing to inform the plaintiffs that there was a notice of intended acquisition endorsed on the document of title in respect of that 5,790 square feet out of 29,317 square feet.

(c) Failing to enquire from the necessary authorities whether the acquisition was being or had been pursued;

(d) Requiring the plaintiffs to pay the 12th third party a sum of RM197,070 for 5,790 square feet of land when that piece could not be sold to the plaintiffs by reason of it having been already acquired by the government; and

(e) In the premises, failing to exercise reasonable care, skill, diligence and competence in acting for the plaintiffs in the sale and purchase of that land.

For these reasons, the plaintiffs failed to purchase 5,790 square feet of land and had suffered loss and damage thereto.

The memorandum of appearance dated 21 November 1989 was filed on the next day as reflected in encl. 3. The statement of defence dated 3 December 1989 was filed on 4 December 1989 as seen in encl. 7. In the statement of defence the defendant denied that he or any of his servants or agents was guilty of the alleged or any negligence or breach of duty and further denied that the matters complained of were caused as alleged in the statement of claim or at all. The defendant denied para. 4 of the statement of claim and averred that he has done all that which was required of him as the plaintiffs' solicitors. The defendant further averred that if he were liable, which he denied, he would be entitled to be indemnified by the vendor namely, the 12th third party. The defendant further denied paras. 5 and 6 of the statement of claim and puts the plaintiffs to strict proof thereof. The defendant then prayed that the plaintiffs' claims be dismissed with costs.

The plaintiffs filed an amended statement of claim and re-dated it on 16 December 1989 as reflected in encl. 9 which was granted by the Senior Assistant Registrar ("SAR"). The amendments were in regard to para. 2(a), an insignificant amendment, and re-numbering para. 2(c) as para. 2(b), and adding a new para. 2(c) which was worded thus:

> The 1st, 3rd, and 4th plaintiffs were the nominees of the 2nd plaintiff under clause 3 of the sale and purchase agreement to be registered as owners of the said land.

The "particulars" of negligence in para. (d) was also amended and it was quite inconsequential.

The plaintiffs too filed a re-amended statement of claim and it was re-dated 21 February 1990 and underlined boldly in green colour which was also inconsequential as reflected in encl. 14.

The defendant filed his amended statement of defence that was re-dated 27 March 1990 and granted by the SAR as reflected in encl. 18. It is ideal to reproduce those amendments:

2(b) As regards paragraph 2(c) of the Re-Amended Statement of Claim the defendant avers that he owes no duty of care towards the 1st, 3rd and 4th plaintiffs as they were not parties to the said sale and purchase agreement dated 21st April, 1984. Further, the 1st, 3rd and 4th plaintiffs were not privy to the contract for services between the 2nd plaintiff and the defendant.

2(c) The defendant avers that the defendant is not liable to the plaintiffs since the 2nd plaintiff has caused the position to be changed by introducing the 1st, 3rd and 4th plaintiffs to the transaction. Even if the defendant is liable to the 2nd plaintiff, which is denied, he is only liable to one-fourth of the damages suffered, if any.

4(a) Paragraph 4 of the Re-Amended Statement of Claim is denied and the defendant avers that he has done all that which is required of him as the 2nd plaintiff's solicitor, namely, he did make a search at the office of the Commissioner of Lands & Mines and inquired at the Land Office, the result of which showed that as at 14th May, 1973, there was only an intended acquisition of a portion of the said land but as late as 27th March 1984 there was no endorsement of actual acquisition, and such endorsement of actual acquisition was made only on 21st July 1988, a fact the defendant could not have discovered on 27th March 1984. The defendant did inform the 2nd plaintiff of the notice of intended acquisition endorsed on the register document of title in respect of a portion of the said land (but the actual area was not stated in such endorsement) *vide* G.N. No. 341 dated 14th April, 1973.

4(b) The defendant further avers that if the defendant were liable, which is denied, the defendant is entitled to be indemnified by:

(i) Seng Hup Chan Auto Supply Sdn Bhd;

(ii) The District Land Administrator;

(iii) The Director of Lands & Mines; and

(iv) The Government of Johore Darul Takzim

and the defendant intends to bring them as Third Parties in these proceedings.

It is now apparent that the defendant has since cited these third parties in these proceedings and it is the defendant's prerogative to do so. This judgment is not about the third parties but rather it is confined to a very limited area – the re-instatement of encl. 144. This judgment does not decide the fate of all the third parties as it is focussed on encl. 148. All the third parties should not be unduly alarmed when they read this judgment.

The amended statement of defence in encl. 18 adverted to the date of 21 April 1984 as the date of agreement between Seng Hup Chan Auto Supply Sdn Bhd and one Leong Yoon Fook, the 2nd plaintiff, for the purchase of 29,317 square feet of land and evidently this was not the date of the retainer between the plaintiffs and the defendant.

It is now apparent that by an affidavit-in-reply that was affirmed by the defendant on 5 May 1990 and filed on 7 May 1990 as reflected in encl. 21, it was deposed that the second plaintiff called at the defendant's office on 26 March 1984 and instructed the defendant to act for him in the purchase of 29,317 square feet of land. That must be the date of the retainer and it seemed that the second plaintiff was very anxious to purchase that 29,317 square feet of land and requested the defendant to make a title search at the Land Registry so that the second plaintiff could conclude the deal without any delay.

The Obligations Of An Advocate And Solicitor – The Law And Its Perspectives

That retainer imposes an obligation on the part of the defendant to be both skilful and careful. In *Spector v. Ageda* [1973] Ch 30, [1971] 3 All ER 417, the court held that a solicitor must put two things at his client's disposal: skill and knowledge. I may add that a solicitor holds himself out as having adequate skill and knowledge (*Pearson v. Pearson (Queen's Proctor showing cause)* [1971] P 16, [1969] 3 All ER 323) to conduct whatever business he undertakes be it contentious or non-contentious. Without a doubt, a solicitor owes a duty to his client both in contract and in tort (*Midland Bank Trust Co Ltd v. Hett, Stubb and Kemp (a firm)* [1979] Ch 384; *Clarke v. Kirby-Smith* [1964] Ch 506; *Bagot v. Stevens, Scanlon & Co Ltd* [1966] 1 QB 197; *Cook v. S* [1967] 1 All ER 299, [1967] 1 WLR 457, CA; *Heywood v. Wellers (a firm)* [1976] QB 446 and *White v. Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL).

What if the solicitor is in breach of his contractual duty to his client, or if that solicitor fails to use proper care and his client suffers a loss, would that solicitor be liable in damages?

The answer is in the positive even if the claim in negligence is for purely financial loss. The case of *Pilkington v. Wood* [1953] Ch 770, [1953] 2 All ER 810 is a striking example. There the purchaser refused to complete the sale because of a defect in title and the damages recovered by the vendor against the solicitors who acted for him when he bought the property were the difference at the time of the original purchase between the value of the property with a good title and its value with the defect. But where the solicitor conducted the action negligently (*Godefroy v. Dalton* [1830] 6 Bing 460), or for that matter negligently fails to bring an action, the measure of damages would be the amount the plaintiff might have recovered in the action in the event the solicitor had exercised due diligence (*Harrington v. Binns* [1863] 3 F & F 942). Negligence of a solicitor to bring an action within the limitation is exemplified in the case of *Buckley v. National Union of General and Municipal Workers* [1967] 3 All ER 767.

But a word of caution, not all facts would constitute negligence. Thus, it is a correct proposition of the law to say that a solicitor is not guilty of negligence if he merely acted on his client's instructions in the reasonable belief as to its correctness (*Lewis v. Collard* [1853] 14 CB 208). In *Griffiths v. Evans* [1953] 2 All ER 1364, [1953] 1 WLR 1424 CA, the court held by a majority that a solicitor would not be negligent in failing to advise a workman who was in receipt of a workman's compensation that he had an alternative claim in common law. The solicitor too would not be negligent if:

(a) he had explained fully the legal position to his client and the client still instructed him to proceed (*Lee v. Dixon* [1863] 3 F & F 744, *The English Reports,* vol. CLXXVI Nisi Prius VII, p. 341);

(b) he had committed an error of judgment in regard to matters of discretion (*Hill v. Finney* [1865] 4 F & F 616 at 625n and *Faithful v. Kesteven* [1910] 103 LT 56, CA);

(c) he had committed an error of judgment in regard to matters of law (*Shilcock v. Passman* [1836] 7 C & P 289; *Hart v. Frame* [1839] 6 CI & Fin 193, HL; and *Purves v. Landell* [1845] 12 CI & Fin 91 HL); and

(d) he had acted on solicitors's advice (*Francis v. Francis and Dickerson* [1956] P 87, [1955] 3 All ER 836; and *Cook v. S* [1966] 1 All ER

248) and towards this end the solicitor must show that the counsel was a competent person (*Chapman v. Chapman* [1870] LR 9 Eq 276) and the solicitor must have carried out to the fore what counsel had accordingly advised (*Godefroy v. Dalton* [1830] 6 Bing 460; *Potts v. Sparrow* [1834] 6 C & P 749 and *Andrews v. Hawley* [1857] 26 LJ Ex 323).

I venture to place a caveat. These are general observations on the obligations of an advocate and solicitor and cannot be taken to be an exposition of the defendant's negligence. The issue of the defendant's negligence would be kept at bay.

The Acquisition Of 5,790 Square Feet Of Land From 29,317 Square Feet

By a declaration dated 14 April 1973 made pursuant to s. 8 of the Land Acquisition Act 1960, the director of lands and mines (the 3rd third party) acting upon the direction of the Johore State Government (the 4th third party) caused a notice of intended acquisition of an approximate area of 5,790 square feet. Pursuant to s. 9 of the Land Acquisition Act 1960, the registrar of titles (the 2nd third party) duly made a note of the notice of intended acquisition, without mentioning the area of the land intended to be acquired, upon the register document of title on 14 May 1973. The district land administrator (the 1st third party) actually proceeded to commence proceedings for the acquisition of 5,790 square feet of land and on 24 February 1974, issued a notice in form "H" as required under s. 16 of the Land Acquisition Act 1960 to require the then registered proprietor one Soh Seng Thye (deceased) by one of his personal representatives one Soo Swee Tan (now deceased and the 11th third party) to confirm acceptance of the offer of an award of RM25,372 as compensation for the acquisition of that 5,790 square feet. Soo Swee Tan signed on form "H" and directed that payment of the award be sent to his solicitors Messrs Ong Ban Chai & Co, Advocates and Solicitors, Johor Bahru. Pursuant to s. 22 of the Land Acquisition Act 1960, the district land administrator (the 1st third party) took formal possession of that 5,790 square feet of land on 19 June 1974 by serving a notice in form "K" and paying the award of RM25,372 to Messrs Ong Ban Chai & Co who acted for the personal representatives of the deceased registered proprietor. As I said in the early part of this judgment on 26 March 1984 the defendant was instructed by the second plaintiff to act as his solicitor in respect of the purchase of that 29,317 square feet of land from the 12th third party the then registered proprietor of the land. At the behest of the second plaintiff, the defendant caused the normal title search to be made on the land registry on the following day, and that would

be 27 March 1984, and the defendant found that there was a partial acquisition of the land amounting to 2,672 square feet. There was a further indorsement of an intended acquisition of an unspecified area *vide* G.N. No. 341 of 14 April 1973. A copy of that land title search was annexed and marked as "GKS 1" in encl. 21. It seemed that on 27 March 1984 at about 2.15 p.m., the defendant telephoned the second plaintiff and informed him of the result of the title search and the second plaintiff confirmed that he would call back the following day to finalise the transaction. On 29 March 1984 or thereabout the second plaintiff called on the defendant personally to give further instructions and the defendant then brought to his attention the indorsement of the intended acquisition of an unspecified area *vide* G.N. No. 341 of 14 April 1973 as evidenced from the land title search. Nevertheless, the second plaintiff still wanted to proceed with the purchase and handed to the defendant a cheque no: 813509 drawn on Hongkong and Shanghai Banking Corporation for RM145,500 being payment for 15% deposit (RM145,177.15) and part payment for disbursements. The second plaintiff emphasised that it was urgent and important that he should purchase the 29,317 square feet of land as he was keen in applying for the adjoining land from the state government. According to the second plaintiff it was a worthwhile venture as the vendor – the 12th third party was willing to assist him in the application by signing all the necessary papers and plans. When the defendant advised the second plaintiff of the intended acquisition of the land and the uncertainty of succeeding in the application for the adjoining land, the second plaintiff had asked the defendant not to worry as the second plaintiff was a justice of the peace [JP] and a very influential man in town. The second plaintiff intimated that there would not be a problem for him to get the approval from the relevant authority. The second plaintiff urged the defendant to expedite the matter and to get in touch with the solicitors of the 12th third party, Messrs SK Song. Subsequent to the land title search that was made on 27 March 1984 and prior to the execution of the sale and purchase agreement by the second plaintiff on 21 April 1984, the defendant personally made a further inquiry at the land office about the intended acquisition *vide* G.N. No: 341 of 14 April 1973. The officer whom the defendant approached was not able to confirm whether or not there was any actual acquisition of the allegad 5,790 square feet or any other area. An elaboration of the land search that was made on 27 March 1984 must be made. Now, the defendant caused a land title search to be carried out at the office of the director of lands and mines in Johor Bahru (the 3rd third party) by inspecting the register document of title of the land in question. The search revealed that the 12th third party was the registered proprietor of the land having an area of 29,317 square feet, and that land was charged to Malayan Banking Berhad. An indorsement of a notice of intended

acquisition *vide* G.N. 341 dated 14 April 1973 was noted on the register document of title. On 28 March 1984 the defendant wrote a letter to the district land administrator (1st third party) to seek a confirmation that the notice of intended acquisition had lapsed without actual acquisition proceedings being taken. The district land administrator (1st third party) failed to reply to that letter. The defendant also relied on the register document of title of the land in question as conclusive evidence of the area of the land and other particulars of the land as described therein and the defendant then advised the second plaintiff of the results of that land title search which culminated in the signing of the sale and purchase agreement between the second plaintiff and the 12th third party dated 12 April 1984. As I said, the 12th third party was represented by Messrs SK Song, Advocates and Solicitors, Johor Bahru.

It was the defendant's stand all along that he could not acquire such knowledge of the facts or matters about the partial land acquisition of 5,790 square feet which was completed in 1974 by reason of the negligence of the 1st, 2nd, 3rd third parties and/or breach of statutory duties specified under the Land Acquisition Act 1960. If the matter were to proceed to trial in 1998, the defendant would certainly encounter extreme difficulties to call the relevant witnesses involved in this ugly episode that took place 24 years ago. With respect, the law says that the district land administrator (1st third party) should comply with the mandatory requirement of s. 22(3)(b) of the Land Aquisition Act 1960 in that as soon as the taking of the formal possession of the acquired part of 5,790 square feet was completed, a copy of the notice in form "K" should have been served upon the proper registering authority – either the Registrar of Titles (2nd third party) and/or the director of lands and mines (3rd third party) as it was mandatory that a memorial should have been made upon the register document of title of the land to note that 5,790 square feet of land had been acquired in 1974. I repeat I am merely stating the law and this judgment is not intended to decide on the fate of all the third parties but merely to show the sequence of events that led to the acquisition of 5,790 square feet of land out of 29,317 square feet. It is interesting to note that on 2 December 1984 the transfer of the land from the 12th third party to the plaintiffs was registered by the Registrar of Titles (the second third party) as having an area of 29,317 square feet. After registering the said transfer, the issue document of title was returned by the director of lands and mines (the 3rd third party) to the defendant as solicitors sometime in February 1985 without endorsing any memorial as to the actual acquisition of 5,790 square feet which acquisition was fully completed some eleven years earlier in 1974.

The plaintiffs discovered the actual acquisition to be 5,790 square feet in 1988 and brought that fact to the district land administrator's (the first third party's) attention whereupon on 28 March 1988, some 14 years later, the first third party sent a copy of the notice in form "K" to the director of lands and mines (the 3rd third party) to request that a memorial of the actual acquisition of 5,790 square feet be made on the register document of title. It was only on 25 July 1988 that the Registrar of Titles (2nd third party) made a memorial *vide* Folio 31 Jilid 252 dated 21 July 1988, on the register document of title of the land to show that an area of 5,790 square feet had been acquired. As I said the mandatory requirement of s. 23 of the Land Acquisition Act 1960 was only performed 14 years later after the actual acquisition was completed. This was the scenario behind the defendant's woe. Now, on these set of facts the plaintiffs motivated by malice chose to sue the defendant alone. Incidentally the solicitors for the 12th third party namely, Messrs SK Song too played a role in that sale transaction and should know what was happening. These observations are made to show the maliciousness of the plaintiffs. It must be recalled that the defendant had advised the second plaintiff of the intended acquisition of the land but the second plaintiff was keen to proceed as he thought that he could apply for that adjoining piece of land. In short, the defendant had advised the second plaintiff of the legal position but the second plaintiff was still bent on proceeding with that purchase and instructed the defendant to proceed ahead. This brings me to the case of *Lee v. Dixon [supra]*. The facts in that case must be viewed in the context of the Jury trial. The headnote of that case makes for interesting reading. A verbatim reproduction is called for and it is worded thus (see p. 341 of the report):

> Though, when an attorney is employed to recover a small debt, he is liable to his client for unnecessarily and improperly suing in a Superior Court (unless, with a knowledge of the consequences, his client instructs him so to do), yet his liability will depend upon whether, from his client's instructions to him, he might reasonably suppose that he would recover, and desired to sue for, a sum which would carry costs; or that from the circumstances and the nature of the question, a Judge would certify for costs, and if he might reasonably so have supposed he will not be liable, even though his client, failing to recover in the Superior Court, became subject to the costs of suit in that Court.

The facts of which were as follows (see p. 341 to p. 342 of the report):

> The first count stated that the plaintiff retained the defendant as and being an attorney, to proceed to recover for the plaintiff, by action, from one Gregory, a sum of money claimed by the plaintiff to be due to him from Gregory. That the defendant accepted such retainer for reward, but, instead of proceeding for the recovery of the money in the Sheriffs' Court, London as he could and

might and ought to have done, and could have done at much less cost and risk to the plaintiff than by proceeding in her Majesty's Superior Courts at Westminster, commenced an action for the recovery of the money in one of the said Superior Courts; and such proceedings were had and taken by the defendant in the said Court in such action, that the same came on for trial and a verdict duly thereon found by the jury for the said Gregory against the plaintiff, and judgment obtained on such verdict against the plaintiff, and he was forced to pay his own costs and the costs of Gregory's defence; and

Second count, on which nothing turned, for conducting the action with negligence.

Pleas:
1. Not guilty.
2. Denial of the retainer.
3. That the defendant could not and ought not to have proceeded for the recovery of the said money in the Sheriffs' Court.
4. That he proceeded in one of the Superior Courts at the request of the plaintiff, and at his direction. Issue.

In addressing the members of the jury, Wightman J had this to say (at pp. 343 to 344 of the report):

Wightman, J. (to the jury) – The defendant, as attorney, was only bound to use reasonable care. The negligence imputed to him is – that, knowing that his client, the plaintiff, could only recover less than 20L. on the cheque, and that, therefore, even if he recovered, he could not recover costs, he did not, as the plaintiff alleges, tell him so, and did not tell him that if he failed to recover he would have to pay costs on the scale of the Superior Courts. The defendant admits that he told the plaintiff that if he recovered more than 20L. there was concurrent jurisdiction in the Superior Courts. Now, no doubt, in that he made a mistake *vide*, and there is not concurrent jurisdiction in such cases, except on certain conditions. In that therefore he fell into an error, in law – a mistake as to the construction of an act of parliament. But the question is, whether there was such negligence, upon a matter properly within his knowledge, as to render him liable to an action?

The proceedings having gone on so far as not only plea but interrogatories, so that it was plain the action would be defended, it is said that then, at all events, it was the duty of the now defendant to have stopped the proceedings in the Superior Court, and sued in the Sheriffs' Court. But it is for you to judge whether proceedings, having gone so far, it was negligence in the defendant not to have then stopped them.

The question to be determined between the parties in the original action (as appears from the proceedings) was one of fraud; whether Gregory had not been defrauded out of the cheque, and it was one of those cases in which there

might be ground for supposing that there would be a certificate by the Judge (even in the event of less than 20L. being recovered), that it was a fit case to be tried in the Superior Courts.

That is, although the amount recovered was only less than 20L., still the case was of such a character that it might be that the Judge who tried it would be of opinion that it was fit to be brought in the Superior Courts. And the defendant states that he deemed it was one which also raised a difficult question of law, whether the plaintiff was entitled to recover the entire amount of the cheque or only a part of it. Certainly it was a case which might have been brought in the Sheriffs' Court; and, no doubt, the proceedings there would be less expensive. It is said that the plaintiff was desirous that the action should be commenced in the Superior Court, and there is a contradiction of testimony as to that point on which you must decide.

The question is, whether you are satisfied on this evidence, that the defendant was guilty of negligence or of improper conduct in the management of the cause, or failed in the duty which he owed as an attorney to his client, in conducting the cause as he did? The case on the part of the plaintiff is, that the defendant brought the action in the Superior Court, whereas he ought to have brought it in the Sheriffs' Court. The case on the part of the defendant is, that the plaintiff knew he was proceeding in the Superior Court, and that he told his client that if he recovered less than 20L., he would be liable to pay costs.

That is the case. If you are of opinion that the defendant was guilty of negligence, and that he did not do his duty, your verdict will be for the plaintiff for the amount of the costs. If you are of opinion that the plaintiff was informed as to the result, and that there was no negligence on the part of the defendant, but that he did what he did with the sanction of the plaintiff, then your verdict will be for the defendant.

Verdict for the plaintiff.

Borrowing the words of Wightman J in *Lee v. Dixon [supra]* the defendant here too " was only bound to use reasonable care" in his dealings with the plaintiffs particularly the second plaintiff. Wightman J in *Lee v. Dixon [supra]* left the decision making process entirely to the jury to decide. Here, I have to decide on encl. 148 based on the affidavits. The affidavits tend to show that the defendant was not guilty of negligence and neither was he guilty of improper conduct in the management of that land transaction. Of course, the plaintiffs held contrary views. For my part, I leave the allegations of negligence against the defendant at large and I do not propose to express any opinion on it.

As I said on 11 October 1989 the plaintiffs brought an action against the defendant alleging negligence and also claimed damages in the sum of RM191,070 together with interest thereon at 8% per annum from 12 October 1984 till date of realisation and costs. The sum of RM191,070 claimed by the plaintiffs was in fact over paid by them, as purchasers, to the 12th third party in 1984 for an area of 5,790 square feet that had been acquired.

It is pertinent to point out that on 2 July 1991, the plaintiffs' O. 14 application was allowed with costs by the SAR who ordered summary judgment for RM191,070 together with interest thereon at 8% per annum from 12 October 1984 till the date of realisation. The defendant lodged an appeal to the judge-in-chambers and the High Court Judge, Johor Bahru dismissed it on 29 September 1993. Without furtherado the defendant filed an appeal to the then Supreme Court. The defendant too acted swiftly and on 8 November 1993 he obtained leave to issue third party notice against all the third parties as reflected in encl. 71. Success finally came to the defendant and this was on 9 May 1995 when the Federal Court allowed the defendant's appeal and set aside the judgment of the High Court Judge.

Re-Instatement

The re-instatement in encl. 148 was related to encl. 131 which was a summons-in-chambers filed by the defendant against the plaintiffs for the plaintiffs' action against the defendant to be struck out with costs by the SAR for want of prosecution. Enclosure 131 was filed on 16 December 1996 and it was supported by an affidavit affirmed by the defendant on 16 December 1996 as reflected in encl. 130a. The affidavit-in-reply to encl. 130a was deposed to by the second plaintiff and it was affirmed on 2 January 1997 as reflected in encl. 133. On 15 July 1997 the SAR struck out with costs the plaintiffs' action against the defendant for want of prosecution and the order has since been extracted as reflected in encl. 149. Being aggrieved the plaintiffs filed an appeal to the judge-in-chambers on 18 July 1997 as reflected in encl. 144 and that appeal was duly fixed for hearing before me on 15 August 1997. Unfortunately, on 15 August 1997 Mr Anantha Kumar Ramasamy ("Kumar"), learned counsel for the plaintiffs, failed to appear in chambers for the hearing of the appeal in encl. 144 while Mr Gan Techiong, learned counsel for the defendant, was present and all geared up to submit. In the absence of Mr. Kumar, I had no choice but to strike out the appeal with costs. To re-instate encl. 144, the plaintiffs filed an application in encl. 148 supported by an affidavit affirmed by Mr. Kumar himself on 27 August 1997 as seen in encl. 147. It is now opportune to examine encl. 147:

(1) At para. 4 of Mr. Kumar's affidavit in encl. 147, he averred that he failed to appear for the hearing on 15 August 1997 because he was under the impression that the plaintiffs' earlier application in encl. 142 was fixed for hearing on 15 August 1997 before the deputy registrar. It seemed that the defendant was not served with a copy of encl. 142 and the defendant expeditiously made an official file search by paying the requisite praecipe fees and in due course obtained a photocopy of encl. 142. All these were done in order to ascertain the contents of encl. 142 and were amply set out in the affidavit-in-reply of the defendant as reflected in encl. 152 particularly at para. 6.1 thereto. It must be borne in mind that encl. 152 was affirmed by the defendant on 15 October 1997 and it was filed on the next day.

(2) Enclosure 142 was nothing more than an application for a stay of the hearing of the defendant's application in encl. 131 for striking out the plaintiffs' action for want of prosecution while awaiting for the result of the plaintiffs' appeal to the judge-in-chambers against the decision of the deputy registrar that was delivered on 6 May 1997.

(3) The deputy registrar had on 6 May 1997 decided that the defendant's application to strike out the action ought to be heard first, preferably before the summons for directions which was filed late was fixed for hearing.

(4) Mr. Kumar averred that he was under the wrong impression that encl. 142 and not the plaintiffs' appeal in encl. 144 that was fixed for hearing on 15 August 1997. In my judgment, it was highly implausible for Mr. Kumar to hold onto that notion. Indeed there ought not to be a wrong impression implanted in the mind of Mr Kumar and this can clearly be appreciated when we take into account the following salient reasons:

(a) The plaintiffs' earlier appeal against the Deputy Registrar's decision was already heard and dismissed with costs by the judge of the High Court on 5 June 997 and Mr. Kumar himself attended as counsel for the plaintiffs at the said hearing.

(b) On 7 July 1997, Mr. Kumar attended as counsel for the plaintiffs before the deputy registrar for the hearing of the defendant's application to strike out the action. The deputy registrar reserved judgment which he delivered on 15 July 1997 and allowed the defendant's application to strike out the action for want of prosecution.

(c) It must be emphasised that as at 15 July 1997 Mr. Kumar was already aware that the deputy registrar had already allowed the defendant's application to strike out the plaintiffs' action. It would certainly be nonsensical to say and indeed mind boggling to say that Mr. Kumar believed that the plaintiffs' application for a stay of the hearing of the defendant's application had been fixed for hearing on 15 August 1997.

(d) Of significance to note would be the existence of a letter dated 26 July 1997 emanating from the office of Mr. Kumar. It would be correct to say that by that letter, Mr. Kumar's office served a notice of appeal and specifically informed the defendant that the plaintiffs' appeal against the order striking out the action for want of prosecution had been fixed for hearing on 15 August 1997.

(5) At para. 4 of Mr. Kumar's affidavit in encl. 147, he claimed that as he had failed to realise that the plaintiffs' appeal was fixed for hearing on 15 August 1997, he had conveniently attended to a Divorce Petition no: 33-311-1994 before another judge of the High Court in Johor Bahru. This assertion prompted the defendant to make an official file search on the court's file in relation to the Divorce Petition no: 33-311-1994 and accordingly the defendant after having paid the necessary praecipe fees obtained a photocopy of the notice of hearing. Surprisingly that notice of hearing showed that the divorce petition as adverted to by Mr. Kumar was fixed for hearing on 15 August 1997 at 11.00 a.m. It is germane to mention that that notice of hearing was exhibited and marked as "B" in the defendant's affidavit-in-reply in encl. 152.

(6) Now, since Mr. Kumar deposed that he was under the "wrong impression" that encl. 142 was fixed for hearing before the deputy registrar on 15 August 1997, the next obvious question to pose would be: Why did he fail to appear before the deputy registrar on that day at 9.00 a.m. after all his presence before the judge of the High Court in Divorce Petition no: 33-311-1994 was only required at 11.00 a.m.? In my judgment, the excuses advanced by Mr. Kumar were without merits. It was difficult to believe and highly improbable. An advocate and solicitor who handles a case where his colleague at the bar was sued for negligence should be diligent, careful and alert in the conduct of his affairs in court. This would be appreciated if taken in the context that the plaintiffs' action had already been struck off for want of prosecution by the deputy registrar. It would be correct to say that the plaintiffs' counsel's failure to attend court on 15 August 1997 and the

subsequent application by the plaintiffs to re-instate their appeal had caused the disposal of the action to be further delayed. The plaintiffs' indolent conduct can be said to be contumelious.

On two occasions, the Court of Appeal Judges have stressed the need to be vigilant and not indolent. In *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628, Siti Norma Yaakob JCA said at p. 629 of the report:

> The omission on the part of a solicitor to be vigilant can hardly be described as an acceptable explanation.

Gopal Sri Ram JCA too in the case of *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822 remarked at p. 826 of the report:

> Further, she was entirely correct in classifying the conduct of the instant appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the Court. It is axiomatic that the law assists the vigilant and not the indolent.

The defendant, a senior member of the bar, had been greatly prejudiced. The civil suit had been "hanging" over his head for so many years. It was intolerable and certainly the defendant would not be able to quantify, in monetary terms, the prejudice suffered by him. It is germane to take into account the following set of facts:

(a) The plaintiffs' allegation of negligence which was strongly denied by the defendant was based on a transaction handled by the defendant as a solicitor that stretched for a span of 14 years beginning from 1984.

(b) The land acquisition which the plaintiffs' alleged that the defendant had failed to discover with promptitude took place in 1974 – approximately 24 years ago. The words "failed to discover" are certainly appropriate and described the actual event that took place. It must be recalled that the land acquisition was not recorded on the register document of title until 1988. Now, if the trial were to be held in 1998, the defendant would certainly face tremendous difficulties in trying to locate the witnesses that were involved in 1974 and 1984 respectively.

(c) Assuming that the defendant could trace and locate the civil servants who were involved approximately 24 years ago in 1974, it would be extremely difficult to find, among them, witnesses who could recall past events.

(d) The plaintiffs' claim included interest at the rate of 8% per annum from 1984 until the date of payment and arithmetically the amount of interest prayed for after a span of 14 years would far exceed the principal sum.

(7) It was the defendant's stand all along as seen from the affidavits that his reputation was badly scarred by the plaintiffs' action. The wide publicity accorded in the major newspapers did not do justice to the defendant. The defendant rightly deposed the following:

(a) That when the High Court Judge, Johor Bahru upheld the summary judgment as ordered by the SAR against the defendant on 29 September 1993, the grounds of judgment were publicised in the major local newspapers like the New Straits Times, Berita Harian, The Star, Nanyang Siang Pau and several other dailies on the very next day after it was delivered.

(b) The grounds of judgment of the High Court Judge, Johor Bahru could only be made available to the press by the plaintiffs' or their counsel on the day of delivery of the decision because the judgment was delivered in chambers.

(c) That wide publicity brought with it an adverse side effect. The defendant's office was flooded with telephone calls from clients to enquire whether the defendant was still around. Other solicitors in town too called to enquire about the case. It seemed that several clients even doubted the defendant's professional ability and to use a familiar phrase they ran "helter-skelter" to seek other solicitors for legal advice. The defendant, an ordinary mortal, must have suffered extreme humiliation and mental torture and anguish as a result of the present action which had been in existence since 11 October 1989.

(d) Members of private associations where the defendant served as honorary legal advisers questioned the defendant in regard to the ongoing civil action where the defendant was named as the sole defendant.

(e) The defendant too believed that the wide and adverse publicity caused by the plaintiffs' and or their counsel's action after the High Court Judge's decision was reported in the local media had caused several banks to refuse to allow the defendant's firm to be included in their list of panel of solicitors.

(f) The defendant deposed that the Fedaral Court had earlier fixed the appeal against the High Court Judge's decision in January, 1995 but it was postponed on the application of Mr. Kumar who attended as counsel for the plaintiffs. Although the Federal Court ordered costs for the day to be paid to the defendant, yet that postponement inevitably caused the matter to be delayed further.

(g) After the Federal Court had allowed the defendant's appeal and set aside the judgment of the High Court Johor Bahru on 9 May 1995, the plaintiffs' remained indolent and further delayed the action by failing to take out the summons for directions within one month in order to comply with O. 25 r. 1(1) of the Rules of the High Court 1980 ("RHC"). The plaintiffs too failed to advance any reason for their protracted delay. The plaintiffs only served a summons for directions after the defendant's application to strike out their action was served on their solicitors in December 1996.

(h) The defendant deposed that the plantiffs' action was *mala fide* because they named only the defendant as the sole defendant notwithstanding the fact that they could have taken the Registrar of Titles to court for neglecting to endorse the register document of title to show the partial acquisition of the land which they bought. It was also deposed that the plaintiffs could have sued the 12th third party as the vendor for the refund of their monies. But alas, the plaintiffs chose to pursue the matter with the defendant alone, alleging negligence and wanted the defendant to repay them monies which were received by the 12th third party. It must be pointed out that the second plaintiff affirmed an affidavit on 2 January 1997 in reply to the defendant's affidavit dated 16 December 1996 but unfortunately the second plaintiff did not specifically answer this issue.

The tenor of para. 4 of encl. 147 showed that the mistake was entirely on the part of Mr. Kumar. Thomson LP in *Abdul Majeed v. Yeo Chng Tay* [1964] 30 MLJ 75 was of the view that the mistake of the legal adviser who was under an erroneous impression that it was a case where leave was required under s. 37 of the Courts Ordinance and because of that mistake the matter became out of time for appealing in the ordinary way was not a sufficient ground for leave to appeal to be given. In *Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58, Ali FJ speaking for the then Federal Court had this to say in regard to a solicitor's mistake at p. 59 of the report:

> Here is a clear admission that the failure to serve the notice was due to the solicitor's mistake. Needless to say that such mistake is not a ground for granting special leave. That must be so for the obvious reason that it is not possible to draw a dividing line between a mistake which can support the exercise of a discretionary power and that which cannot. A mistake is a mistake whatever may be the reason for it. As to whether or not Mr. Foo's mistake amounts to negligence we express no opinion.

Chang Min Tat J in *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129 FC held that the mistake of the appellant's solicitors did not constitute a sufficient ground for granting the extension of time. On the same subject matter, Ajaib Singh J in *Haji Mohamed bin Suboh v. Devadas* [1981] 1 MLJ 136, 137 had this to say:

> In respect of appeals from the High Court to the Federal Court a mistake by a legal adviser in his interpretation of the relevant rule is not a sufficient ground for granting special leave to appeal out of time. Indeed in the celebrated case of *Re Coles and Ravenshear* [1907] 1 KB 1 itself the Court of Appeal had held that a mistake of counsel as to the effect of the relevant rule was not a sufficient ground for granting special leave to appeal out of time. This case was decided before the law on this point was changed in England (see *Gatti v. Shoosmith* [1939] 3 All ER 916). The law here in Malaysia as was pointed out by Suffian F.J. (as he then was) in the case of *Chong Kueng Ying & Ors. v. Lovis Lavagna* [1972] 1 MLJ 180 is the same as the previous English Law – the mistake of a legal adviser is not a sufficient ground for granting special leave. Similarly in *Chin Hua Sawmill Co. Sdn Bhd v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 it was held that the failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.

In my judgment, for the reasons adumbrated above, the plaintiffs' and their counsel had failed to disclose any reasonable ground to re-instate encl. 144. There was absolutely no ground for me to exercise my discretion in favour of the plaintiffs' at all. To borrow the words of Gopal Sri Ram JCA in *Soh Keng Hian v. American International Assurance Co. Ltd* [1996] 1 MLJ 191 especially at p. 194 of the report:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But it is not an unprincipled discretion. There must be some relevant evidential material made available to us before we may exercise discretion.

This meant that encl. 148 must be dismissed with costs.

Striking Out For Want Of Prosecution

I have set out in detail the history of the case. To recapitulate the Federal Court had allowed the defendant's appeal and set aside the judgment of the High Court Judge on 9 May 1995. The plaintiffs continued to procrastinate and in so doing delayed the action by failing to take out summons for directions within one month – a requirement under O. 25 r. 1(1) of the RHC. No reason was advanced for this delay. The plaintiffs only served the summons for directions after the defendant's application to strike out their action was served on their solicitors in December 1996. The crucial question to ask would be: When were pleadings deemed to be closed? O. 18 r. 20(1) of the RHC states that:

> 20(1) The pleadings in an action are deemed to be closed –
>
> (a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim ...

Here, the defence was served before the plaintiffs first applied for summary judgment. Order 18 r. 2(1) of the RHC states as follows:

> Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

and from the long recital of the facts as seen in the early part of this judgment, the defence was already served years ago, and the pleadings must be deemed to be closed when the Federal Court set aside that summary judgment – meaning the judgment of the High Court Judge on 9 May 1995 or at the latest 14 days thereafter. In short, the plaintiffs must take out the summons for directions within one month from 9 May 1995. The deadline for the plaintiffs to file their summons for directions should therefore be on 9 June 1995. But alas, the plaintiffs filed the summons for directions on 24 January 1996, more than seven months out of time and failed to give any explanation for the delay. To confound the matter further the plaintiffs also failed to extract the summons for directions until after the service of the defendant's application to strike out the action for want of prosecution in December 1996.

The law on striking out an action for want of prosecution has been lucidly stated by Shaik Daud JCA in *TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin* [1997] 3 MLJ 800 and I gratefully adopt them. His Lordship said at pp. 803 to 804 of the report:

Whether to grant or refuse an application to strike out an action for want of prosecution is solely the discretion of the trial judge. It is a well-settled principle that an appellate court should not readily interfere with such an exercise of discretion. The Federal Court in *Vasudevan v. T Damodaran & Anor* [1981] 2 MLJ 150 stated that it will not interfere with the exercise of discretion of a trial judge in an application to have the action dismissed for want of prosecution. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court should not readily interfere. This statement of law was accepted by another Federal Court case of *Toh Hock Thye & Ors v. Toh Chwee Biow* [1982] 1 MLJ 152, also a case of striking out an action for want of prosecution. (See also the Privy Council decision in *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228). In *Lim Heng Hoo v. Tan Hock Hai & Ors* [1974] 1 MLJ 101, the plaintiff therein failed to take out summons for direction seven months after the pleadings had closed and the defendant applied for the action to be struck out for want of prosecution. The trial court allowed the application and the appeal to the Federal Court was dismissed. In *Toh Hock Thye & Ors v. Toh Chwee Biow*, the Federal Court laid down the law (at p. 153) applicable to this particular issue as follows:

> ...We propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus – that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that:
>
> (1) the plaintiff's default has been intentional and contumelious or;
>
> (2) the plaintiff or his lawyer is guilty of such an inordinate or inexcusable delay that the defendant has been prejudiced by it ...

In the present case, the learned judge exercised his discretion after taking into consideration all relevant matters, especially the history of the action. It must also be remembered that there was already a considerable delay, even before the issue of the writ, of about 24 years, that is after the registration of the transfer in favour of the respondent. Then, there was a further delay of nine months after the issue of the writ. The respondent kindly gave the appellants another opportunity to remedy their default by sending the reminder letter of 8 March 1996 and yet they failed to comply. This failure, in our view, is contumelious.

There is, therefore, no doubt there was this long delay, and a deliberate one at that. It only remains for consideration whether such delay has prejudiced the respondent. In our view, it undoubtedly has. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial (see *Hongkong Bank (M) Bhd v. Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34).

The RHC confers explicit power on the courts to strike out an action when there is non-compliance, or delay in compliance, with the prescribed schedule of timetable. The power to do so exists:

(1) when there has been a delay in filing the statement of claim (O. 19 r. 1 of the RHC);

(2) when there has been a delay in setting down the case for trial (O. 34 r. 8 of the RHC);

(3) when there has been a failure to issue a summons for directions, like the present case (O. 25 r. 1(4) of the RHC);

(4) when there is a failure to comply with the requirements for discovery (O. 24 r. 16(1) of the RHC);

(5) when there is a failure to answer interrogatories (O. 26 r. 7(1) of the RHC);

(6) when there is a failure to prosecute the originating summons proceedings with despatch (O. 28 r. 10(1) of the RHC);

(7) When there is a failure to lodge preliminary act (O. 70 r. 18 of the RHC); and

(8) When there is a failure to file and exchange affidavits (O. 24 r. 16(1) of the RHC).

In addition to that, it is germane to mention that the court too has an inherent power to dismiss an action for want of prosecution.

The failure to take out the summons for directions within one month must be construed adversely against the plaintiffs since this was a requirement of O. 25 r. 1(1) of the RHC. The RHC must certainly be obeyed to the core. In *Yukilon Manufacturing Sdn Bhd "[No: 2]" & Anor v. Dato Wong Gek Meng & 3 Ors* [1997] 3 AMR 2641, 2659 reference was made to the case of *Malaysian International Merchant Bankers Ltd v. Highland Chocolate & Confectionery Sdn Bhd & Anor* [1997] 1 CLJ 480; [1997] 1 MLJ 102 on the need to observe dutifully the RHC. There I said:

> I did say in *Malaysian International Merchant Bankers Ltd v. Highland Chocolate & Confectionery Sdn Bhd & Anor* [1997] 1 MLJ 102; [1997] 1 CLJ 480 that:
>
> > ... the RHC has the force of law and it should not be ignored or overlooked. The observance of the RHC is therefore of considerable importance in litigation and it is the mark of a skilful and experienced

> lawyer to know how best to employ the rules for the practical and tactical advantage of his client. The general purpose of the rules as exemplified in the RHC is to assist the parties in achieving justice and they are not meant, as some lawyers thought, to be the mechanism for disciplining either the parties or their solicitors.

Incidentally, *Yukilon Manufacturing Sdn Bhd "[No: 2]" & Anor v. Dato Wong Gek Meng & 3 Ors [supra]* was also reported in two other popular local law journals *vide* [1997] 4 CLJ 209 and [1998] 5 MLJ 1. In the same vein, there are scores of other pertinent authorities. Thus, in *Ratnam v. Cumarasamy And Another* [1964] 3 All ER 933 PC, Lord Guest had this to say at p. 935 of the report:

> The rules of court must, *prima facie*, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

Then there is the case of *Revici v. Prentice Hall Incorporated And Others* [1969] 1 All ER 772, where Lord Denning MR said at p. 774 of the report:

> Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered.) Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had 3½ months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more.

In short knife stabbing words, Lord Denning MR in *Burmah Oil Co Ltd v. Bank of England* [1979] 2 All ER 461 remarked:

> In litigation as in war if one side makes a mistake, the other can take advantage of it. No holds are barred.

Lee Mun Tuck v. Tan Chin Kah & Anor [1991] 2 MLJ 324 at p. 325, on appeal sub nom *Wee Siew Noi v. Lee Mun Tuck* [1993] 2 SLR 232 at p. 235; and *The Plato'* [1995] 3 SLR 829 (HC) at p. 833 generally lays down the principle that an order dismissing on action for want of prosecution is

a draconian measure and will not be made lightly. In graphic words, Lord Diplock in *Birkett v. James* [1978] AC 297 at p. 318 had this to say on the principles of dismissal for want of prosecution:

> The power should be exercised only where the court is satisfied either: (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

It seems that the rationale that the default should be intentional and contumelious lies solely to protect the institution of the court (see *JA Jolowicz: "Abuse of Process of the Court: Handle With Care"* [1990] CLP 77). Examples of what is intentional and contumelious are abound. For a start, if a party fails to obey a peremptory order of the court without due course, it is said to be intentional and contumelious (*Lee Kuan Yew v. Tang Liang Hong (No. 3)* [1997] 2 SLR 841). In *Confidence Concrete Sdn Bhd v. Shimizu - Premba Sdn Bhd* [1994] 4 CLJ 300; [1994] 1 MLJ 465, there was a failure to set down an action for trial within the time ordered by the court and although the order was not a peremptory order, the High Court held that the default was not only intentional and contumelious but it was inordinately and inexcusably delayed. Being guilty of abusing the process of the court would also be another example. Thus, if a present action is in fact a disguise of a previous action which has been abandoned that would indeed be an abuse of the process of the court (*Re Pek Chuan Development Pte Ltd* [1988] 3 MLJ 140, and *Yong Beng Credit Sdn Bhd v. Tia Chong King @ Tay Chong Keng t/a Polysan Co.* [1993] 4 CLJ 502). But if a party can positively show that there was no intention to ignore or flout the order of the court and his failure to obey was due, in the main, to extraneous circumstances, his failure to obey is said to be not contumelious (*Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630). In *Te Cheng Hoi v. Peh Im Kweng* [1994] 3 CLJ 501; [1994] 2 AMR 1484, the plaintiff there had filed a generally indorsed writ of summons and relying on it he obtained an interim injunction against the defendants. In such an exceptional situation, the normal practice would be for the statement of claim to be filed within 14 days thereafter. But alas, the plaintiff there took his time and after a lapse of 2½ years, the statement of claim was still not filed. The defendant then applied to have the action struck off. The court readily granted the defendant's application as there was an abuse of process in that the "primary

aim of the plaintiff's action ... was to secure an interim injunction and thereafter to wait to see what he could get from the defendant."

It is purely a matter of fact and degree whether there has been an inordinate and inexcusable delay (*Datuk Samy Velu v. Karpal Singh* [1989] 3 MLJ 493; and *The Plato [supra]*). The term "inordinate delay" has been interpreted in *Leong Seng Kiat v. Law Peng Guan & Ors* [1992] 2 CLJ 825 at p. 827; and Official Assignee of the *Property of George Chen Chih Hsiung v. Peter Chi Man Kwong & Ors* [1996] 1 SLR 353 to mean "materially longer than the times usually regarded by the profession and courts as an acceptable period." While the term "inexcusable delay" means no more than there being no satisfactory explanation as to why the case did not proceed with due speed and diligence. In *Leong Seng Kiat v. Law Peng Guan & Ors [supra]*, the risk of fading memory was highlighted. There the third defendant was 76 years old and the only person who knew the background of the property dispute in which his family members were co-defendants. In such a case, the risk of fading memory was particularly acute. The third defendant too stressed that "should anything happen to him, his family would not have any witness to testify in support of the defence." The delay in filing the summons for directions in that case was about 2½ years. Of course, once there is proof of inordinate delay, the onus would naturally fall on the plaintiff to justify it (*The Plato [supra]*; *R. Rajasingam v. Balwant Singh Purba* [1996] 2 MLJ 549 and *Te Cheng Hoi v. Peh Im Kweng [supra]*). All too often, when cornered the plaintiff admits to having no excuse for the delay at all as seen in the case of *Public Finance Bhd v. Natcom Development Sdn Bhd & Ors* [1996] 4 CLJ 291; [1996] 2 MLJ 657 where counsel admitted that the delay was due to an oversight. In *Vasudevan v. T. Damodaran & Anor* [1981] 1 CLJ 84; [1981] 2 MLJ 150, after the close of the pleadings the plaintiff took no further steps to prosecute the action. Seven years after the commencement of the proceedings which was instituted some 10 years after the accrual of the cause of action, the defendants then proceeded to apply to have the action struck off. The court allowed the application. The delay was held to be inordinate. It seemed that no credible excuse was given for the delay. The plaintiff merely sought to attribute the delay to the time to trace certain missing documents but the court held that this was nothing more than a bare asertion. The court further held that the documents were neither relevant nor an issue. To the court it seemed that the real reason for the delay was that the lawyers were having difficulties getting instructions from the plaintiff. The plaintiff too gave another reason and that was to wait for the outcome in two other proceedings relating to the land in question. But the court held that those other proceedings were irrelevant to the present dispute and that the plaintiff had not actively pursued

the present action even after those other proceedings as alluded to by the plaintiff had been disposed off. The case of *Confidence Concrete Sdn Bhd v. Shimizu - Peremba Sdn Bhd [supra]* is another good example. The plaintiffs' solicitors there sought to explain their inordinate delay in setting down the action for trial. It was argued that the firm had lost track of the file because the legal assistant in charge had gone overseas for six months and had left the firm upon her return. The court refused to accept this explanation as a valid excuse. It was also alleged that there was a delay in transferring the file docket from the Kuala Lumpur High Court registry to the Kuching High Court registry. The court however held the view that the delay in the transfer of the file did not present a real obstacle to the plaintiffs' solicitors as they could have set the action down for trial by filing their cause papers in Kuala Lumpur.

KS Chua & Co v. Chui Miang Chew & 5 Ors [1996] 2 CLJ 676 was a case involving dismissal of the plaintiff's claim for want of prosecution and there it involved the mistake of a solicitor and at p. 686 of the report I had this to say:

> From the recital of the facts, it is my judgment that the plaintiffs took time prosecuting their claims after the case was transferred to the High Court on 6 May 1990 and such delay was, in the circumstances, prolonged, inordinate and inexcusable. Public policy demands that the business of the Courts should be conducted expeditiously. The plaintiffs clearly procrastinated and they authored their own downfall by not expeditiously prosecuting their claims.

In *Te Cheng Hoi v. Peh Im Kweng* [1994] 2 MLJ 547 at p. 555, Vincent Ng J lucidly said:

> During the last decade, the English courts have become more willing to dismiss an action for want of prosecution. In the light of the above cases, it can be seen that Malaysian courts, like their English counterparts, are now also quite ready to strike down an inactive and dilatory plaintiff is he does not prosecute his case with due expedition. This salutary power of the court to dismiss cases for want of prosecution if exercised according to the principles laid down by the above-mentioned authorities, would help to reduce delays, clear the backlog of cases and conduct itself within the right side of the maxim that justice delayed is injustice denied. An indolent plaintiff should not be tolerated as this may cause injustice to the defendant in terms of the availability and usability of his important witnesses and documentary evidence.

It is a correct statement of the law to say and I so say that for the defendant to succeed in his action to strike out the plaintiff's claim for want of prosecution, it is not sufficient for the defendant to establish inordinate and inexcusable delay. There is another burden imposed on the defendant and

that would be for the defendant to produce evidence that a fair trial is impossible or that he has suffered or is likely to suffer some serious prejudice as a result of the delay (*United Malayan Banking Corp Bhd v. Palm and Vegetable Oil (M) Sdn Bhd* [1994] 3 MLJ 73 at p. 79). It is entirely a matter of fact and degree when one considers what is serious prejudice. In *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia & Ors* [1995] 2 MLJ 185 at p. 198, the court there said:

> It is generally said that if the trial is based largely on oral evidence of the parties and their witnesses, and the long delay would have impaired the memory of the witnesses, there was in such cases a substantial risk that it was not possible to have a fair trial of the issues in the action. Similarly in situations where key witnesses have died or could not be traced. If on the other hand, the issues in the action were based essentially on documentary evidence, the delay may not give rise to a risk that it was not possible to have a fair trial.

But the High Court in *Sii Hing & Anor v. David TM Ting* [1993] 1 AMR 337 rightly pointed out that:

> ... although the issue in dispute related to various documents and so the nature and effect of those documents could be established essentially by documentary evidence, still, oral evidence would have to be led to establish the circumstances under which the documents came about. It would certainly be an advantage to know and understand something of their background.

I may add that the problem may be further confounded when the case is an old case and the makers of the documents cannot be found and therefore cannot attend court to testify. Without the makers of the documents the trial court would certainly be impeded unless of course the absence of the makers would not lead to the inadmissibility of the documents and those documents are not used for a hearsay purpose or those documents fall under the hearsay exception. In the same vein, the learned judge in the case of *The Plato [supra]* remarked at p. 839 of the report:

> Even if there are witness statements and ship's records available, the makers of these documents are still required to be present in court before these can be adduced in evidence.

In *Biss v. Lambeth, Southmark and Lewisham Area Health Authority* [1978] 1 WLR 38, the facts showed that the action for negligence was left hanging over the defendants' heads for more than 11 years. It aggravated the anxiety of litigation and the delay was held to have affected the defendants' professional reputation. Here, Mr Gan Kim Sing, an experienced advocate and solicitor of excellent standing in Johor Bahru and the sole defendant must have been prejudiced. The psychological effect of the suit hanging over

his head since 1989 must have been traumatic and beyond description. Mr. M. Pathmanathan, learned counsel for the defendant, submitted that the delay of more than seven months before the plaintiffs filed their summons for directions must be considered as inordinate and prejudicial to the defendant and a fit case for striking out for want of prosecution. The facts would certainly speak for themselves.

Conclusion

For the reasons adumbrated above, I had no choice but to dismiss encl. 148 on 25 November 1997. There was absolutely no ground for me to exercise my discretion in favour of the plaintiffs. Only recently, my hardworking clerk who doubled up as my secretary by the name of Mr. Ibrahim bin Jaffar informed me that the plaintiffs sought leave to appeal against my decision in regard to encl. 148 by filing a notice of motion. On being alerted, I swiftly acted and called for the relevant file. Hence, the present judgment.